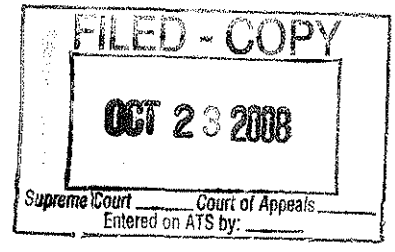
10-23-2008

Spokane Structures v. Equitable Investments Investment Appellant's Reply Brief Dckt. 35349

IN THE SUPREME COURT OF THE STATE OF IDAHO

SPOKANE STRUCTURES, INC., a Washington Corporation, Appellant vs. EQUITABLE INVESTMENT, L.L.C., an Idaho Limited Liability Company, a.k.a. SYSTEMS TECHNOLOGIES, Respondent	)	Docket No. 35349



APPELLANT'S REPLY TO RESPONDENT'S BRIEF

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COMES NOW, the Appellant Spokane Structures, Inc. ("SPOKANE STRUCTURES"), and pursuant to the rules of the Court submits this Reply Brief in response to the Respondent's Brief.

ARGUMENT

1.
EQUITABLE INVESTMENT'S MISTATEMENT OF FACTS

"All truths are easy to understand once they are discovered;
the point is to discover them." Galileo Galilei

EQUITABLE INVESTMENT, L.L.C. ("EQUITABLE INVESTMENT") stated (bold face):

> Respondent's Brief, pp. 2-3: **"Spokane Structures prepared a contract entitled "Build/Design Agreement" that it had used in previous projects. (*Id.*) Equitable requested inclusion of a construction cost ceiling provision."**
>
> Respondent's Brief, p. 5: **"It has long be [sic] held that any ambiguities in a contract are to be construed against the drafter."**

Although it is true that the document was drafted by SPOKANE STRUCTURES, EQUITABLE INVESTMENT actually drafted the "not to exceed $605,000.00." (CR. 74 para. 8) Furthermore, "Linda Tomblin represented that the phrase added by her attorney only related to the design as existed on that date . . ." Id. The ambiguity should be interpreted against EQUITABLE INVESTMENT.

> Respondent's Brief, p. 3: **"Thus, the contract is the undisputed centerpiece of this dispute."**

This allegation is absolutely false. The centerpiece of the dispute is that the contractor was not reimbursed for expenditures made for services rendered for EQUITABLE INVESTMENT by design professionals and engineers. The relationship begins with designing one project and ends with another project, all requested by

EQUITABLE INVESTMENT. (See CR. 74, para. 8, 9) The crux of the case is that EQUITABLE INVESTMENT refused to pay for the services and yet kept the plans, the work product of the service. (CR. 77, para. 16)

> Respondent's Brief, p. 3: **"The contract authorized written change orders to the project once construction was underway."** (Respondent's Brief, p. 3)

EQUITABLE INVESTMENT's citation refers to the "Design/Build Agreement." Regretfully, EQUITABLE INVESTMENT's paraphrasing implies that the change order provision only applies when construction was underway. Actually, the "Design/Build Agreement" says "[c]hange orders *will be handled in writing only*, and billed at cost of change plus 20% profit and overhead." (CR. 85, para. last)

> Respondent's Brief, p. 3: "**Equitable tendered $2,500.00 as consideration for the draft plans.**"

Again, EQUITABLE INVESTMENT cites to the "Design/Build Agreement" again. The "Design/Build Agreement" says nothing about a "tender" or the purpose of the "tender." What it does say is that "$2,500.00 retainer required to be paid "for the plans," . . . "should financing not be obtained." (CR. 85, p. last) It has never been contested that financing was obtained. The Banker's deposition confirms financing was available. (CR. 178, ll. 3-5 and 180 ll. 3-6)

> Respondent's Brief, p. 3: "**In the event Equitable could not obtain financing for the project, it agreed to pay Spokane Structures another $2,500.00." (*Id.*)**

Although more or less an accurate quotation, the innuendo is incorrect. EQUITABLE INVESTMENT wants this Court to believe only $5,000.00 was due. But the $5,000.00 only applies to a lack of financing (CR. 85, para. last), not changing design and requesting substantially more work for two new designs.

Respondent's Brief, p. 3: **"When Equitable declined to sign the contract to commence construction, suit followed. In its Complaint, Plaintiff does not allege the contract is ambiguous, but rather, that Equitable breached an 'enforceable contract.'" (CR. 013.)**

The Complaint (CR. 013) does not say why the suit was filed or limit recovery to an enforceable contract, but the record does reveal that SPOKANE STRUCTURES wants to get paid for expenses requested by EQUITABLE INVESTMENT for the new design. (See Affidavit, R 72-77, and Exhibit "M") As far as the Complaint, it contains five "alternative or additional" claims. (See CR. 18, para. 1-5) On the very page cited by EQUITABLE INVESTMENT, paragraph 5 says "SPOKANE STRUCTURES conferred a benefit to EQUITABLE INVESTMENT and is entitled compensation for the benefit." (CR. 13, p 5) Obviously, the Complaint is not based solely on a claim "that EQUITABLE INVESTMENT breached an 'enforceable contract.'"

Respondent's Brief, p. 6: **"The contract expressly provided that the cost of construction was not to exceed $605,000.00, "which includes all costs associated with construction, including overhead and profit." (CR. 085.)**

The "Design/Build Agreement" does not expressly provide a cap. It clearly allows change orders, and the e-mails and new design certainly show changes in design and cost were handled in writing with the agreement of both parties. (See Lewis Affidavit, CR. 72)

Respondent's Brief, p. 8: **"The contract unambiguously required, as a condition precedent to commencing construction, agreement between Equitable and Spokane Structures as to the final design and cost of construction."**

Not true. The "Design/Build Agreement" states a "final cost of construction will be provided." (CR. 85 para. last) SPOKANE STRUCTURES provided such in a supplemental and more finalized document, but it was not required. The only

unambiguous condition to construction was financing, and it is uncontested that financing was available.

> Respondent's Brief, p. 10: "**As already noted, the theory underlying Equitable's summary judgment motion was that failure to agree to a cost of construction was fatal to the going forward with the project.**"

Failure to agree on a cost of construction could be found to be true by a trier of fact, after a full and fair trial, but at this date it is contested. Even if a trier of fact did determine that no enforceable contract existed, then equity demands that expenses expended for the benefit of a party should be paid.

Vladamir Lenin once said, "A lie told often enough becomes the truth." Luckily, in this country, we have a judicial system that demands the truth and the whole truth.

2.
EQUITABLE INVESTMENT'S MISTATEMENT OF THE CITED LAW

At page five of its Reply Brief, EQUITABLE INVESTMENT cites to *Rath v. Managed Health Network*, Inc., 123 Idaho 30, 844 P.2d 12 (1992) as standing for the proposition that determinations as to whether a contract is ambiguous should be made from the express language of the contract and without resort to extrinsic evidence. However, the cited case bears no resemblance to this proposition, though it does deal with the issues of ambiguity in contracts. In fact, what the *Rath* case actually pronounces is that a contract must be viewed as a whole and considered in its entirety. A case cited by the *Rath* court, *Morgan v. Firestone, & Rubber Co.*, 68 Idaho 506, 201 P.2d 976 (1948) is referenced as establishing that provisions of a contract are to be read together and harmonized whenever possible. SPOKANE STRUCTURES has always asserted that the contract includes not only the Design/Build Agreement, but also the emails and other subsequent communications.

Further, EQUITABLE INVESTMENT cites the case of *Moore v. Omnicare, Inc.*, 141 Idaho 809, 118 P.3d 141 (2005), again at page five of its Reply brief, in support of the proposition that contracts are to be construed against the drafter. SPOKANE STRUCTURES can find no such language or implication of such in the *Moore* case.

EQUITABLE INVESTMENT also cites the case, *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 828 P.2d 848 (1992). This case does not even appear to address issues of contract law, but is rather a statutory interpretation case. EQUITABLE INVESTMENT's brief at page 5 states: "However, ambiguity is not established merely because a party offers a different interpretation to the court." The cited case clearly relates to statutory interpretations and not private contracts between individuals.

The case of *Luzar v. Western Sur. Co.*, 107 Idaho 693, 692 P.2d 337 (1984), while dealing with issues of contract interpretation, does not precisely state what EQUITABLE INVESTMENT says it does. EQUITABLE INVESTMENT states that: "Where the court determines that the parties' intention is clear from the language of the contract, its interpretation and legal effect are to be resolved by the court as a matter of law." However, *Luzar* does not include that statement. This mischaracterization of the case is pointed out merely to facilitate accurate analysis of such a complex set of issues.

EQUITABLE INVESTMENT cites *Mecham v. Nelson*, 92 Idaho 783, 451 P.2d 529 (1969) as standing for the proposition that the $605,000.00 sentence was a condition precedent. But the case holds that the determination of the existence of a condition precedent is "generally dependent on what the parties intended, as adduced from the contract itself" *Id* at 787. EQUITABLE INVESTMENT's directions and change orders led to the increase in the cost of construction, then as an obvious pretext, relied on the

$605,000 term to cancel the contract. The many communications between the parties after execution of the "Design/Build Agreement", in conjunction with the language in the Agreement regarding change orders, either rendered the $605,000 term precatory or amended "Design/Build Agreement" to conform to the subsequent actions of the parties. *Mecham* shows that to characterize the subject term as a condition precedent is a gross distortion of the parties' intent if adduced by the "contract".

EQUITABLE INVESTMENT cuts to the heart of the condition precedent issue at page 8 of its Reply Brief, stating: "There remains a contract but there can be no breach." This simple statement not only proclaims the position taken by EQUITABLE INVESTMENT but also sums up the error of the District Court. Such a claim could not be further from the actual definition of "contract" under American and Idaho Law. Black's Law Dictionary, 6th Ed. (1990) at page 322, defines a contract at it most basic as:

> An agreement between two or more persons which creates an obligation to do or not to do a particular thing. As defined in Restatement, Second, Contracts, §3: "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." (emphasis added)

EQUITABLE INVESTMENT also cites to *Rutter v. McLaughlin*, 101 Idaho 292, 612 P.2d 135 (1980). It is interesting to note that the *Rutter* case firmly supports the proposition that if a contract is reasonably subject to conflicting interpretation it is ambiguous; and that because the Appellant in that case did not present the entire record of the lower court, the missing portions were presumed to support the trial court's decision. Hence, given that Court's focus on ambiguity, the case might have gone much differently had the record been sufficiently presented.

EQUITABLE INVESTMENT also generally invokes *Steiner v. Ziegler Tamura Ltd., Co.*, 138 Idaho 238, 61 P.3d 595 (2002) (citing *World Wide Lease, Inc., V. Woodworth*, 111 Idaho 880, 728 P.2d 769 (1986)) as supporting its argument regarding conditions precedent. It is interesting to note, as with the *Rutter* case, that while the case does acknowledge conditions precedent, it more importantly recognizes their limitations. For instance, at page 599, citing *World Wide Lease*, the *Steiner* case states:

> A condition precedent is an event not certain to occur, but which must occur, before performance under a contract becomes due. A condition precedent may be expressed in the parties' agreement, implied in fact from the conduct of the parties, or implied in law (constructive) where the courts "construct" a condition for the purpose of attaining a just result. When there is a failure of a condition precedent through no fault of the parties, no liability or duty to perform arises under the contract. A condition precedent is distinguishable from a promise or covenant in that a condition creates no right or duty of performance in itself and its non-occurrence does not constitute a breach of the contract. "A promise in a contract creates a legal duty in the promisor and a right in the promisee; the fact or event constituting a condition creates no right or duty and is merely a limiting or modifying factor." A covenant is a duty under the contract, the breach of which gives a right to enforce the contract.

Id., citing *World Wide Lease, Inc. v. Woodworth*, 111 Idaho 880, 887, 728 P.2d 769, 776 (Ct.App.1986) (citations omitted).

Further, and again citing *World*, the court stated: "As a general rule, conditions precedent are not favored by the courts." *Id.*. This case certainly does not support EQUITABLE INVESTMENT's interpretation that a condition precedent existed.

EQUITABLE INVESTMENT also invokes the nineteenth century United States Supreme Court case of *Rich v. Braxton*, 158 U.S. 375 (1895), to bolster the notion that equity should not apply where there is a remedy at law. What EQUITIBLE INVESTMENT did not focus on was the other shoe that dropped in the *Rich* case. That

venerable and long standing United States Supreme Court decision announced at page 406 that:

> These authorities do not control the present question. It must be remembered that 'it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' *Boyce's Exrs v. Grundy*, 3 Pet. 210, 215; *Drexel v. Berney*, 122 U. S. 241, 7 S.Ct. 1200 (1887), 252, 7 Sup. Ct. 1200; *Allen v. Hanks*, 136 U. S. 300, 311, 10 Sup. Ct. 961,. And the applicability of the rule depends upon the circumstances of each case. *Watson v. Sutherland*, 5 Wall. 74 (1867), 79.

The case of *Thomas v. Campbell*, 107 Idaho 398, 690 P.3d 333 (1984) is cited by EQUITABLE INVESTMENT for the same reason as *Rich*. Similarly, *Thomas* drives home the requirement that a legal remedy must be adequate:

> Although there is the established principle of law that equity will not afford relief to a plaintiff where there is an adequate remedy at law, " 'it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' " *Rich v. Braxton*, 158 U.S. 375, 406, 15 S.Ct. 1006, 1017, 39 L.Ed. 1022 (1895) (citations omitted); see Am.Jur.2d Equity § 94 and cases cited therein.

Thomas, 107 Idaho at 404, 690 P.3d at 339.

Many cases cited by EQUITABLE INVESTMENT are not supportive of the position of EQUITABLE INVESTMENT. That mischaracterization again shows the weakness of EQUITABLE INVESTMENT's position and why a trial should be held on the matter.

3.
EQUITABLE INVESTMENT HAS FAILED TO SUCCESSFULLY REFUTE SPOKANE STRUCTURES' ARGUMENTS

There is little doubt that the "Design/Build Agreement" could have been drafted with greater clarity. However, no matter how poorly written this "Agreement" is,

EQUITABLE INVESTMENT has failed to prove that SPOKANE STRUCTURES' right to a fair and full trial should be eliminated.

3.1
THE CONTRACT IS AMBIGUOUS.

It is uncontested that whether a contract is ambiguous is a question of law over which the Supreme Court exercises free review.

EQUITABLE INVESTMENT, in its Response Brief, claims that SPOKANE STRUCTURES has waived the right to assert the existence of an ambiguity because such claim is not pled with particularity. Such an argument was not argued in the District Court and is inconsistent with notice pleadings. In the pleadings, SPOKANE STRUCTURES simply asked for enforcement of contract if enforceable and if not then equitable reimbursement of unjust enrichment. There is certainly a basis to determine that the "Design/Build Agreement" is ambiguous.

EQUITABLE INVESTMENT failed to respond to the four reasonable interpretations of the $605,000.00 clause in the "Design/Build Agreement."

a) EQUITABLE INVESTMENT claims that the contract between the parties was expressly contingent upon the ability to construct the office for $605,000.00 or less.

b) SPOKANE STRUCTURES claims the $605,000.00 was solely for the design originally presented by EQUITABLE INVESTMENT, not new design requests.

c) SPOKANE STRUCTURES' attorneys suggest that the $605,000.00 was never a complete cap because the change order provision always existed.

d) The District Court holds the $605,000.00 is not a cap since EQUITABLE INVESTMENT has no obligation to build.

EQUITABLE INVESTMENT ignores this obvious ambiguity. EQUITABLE INVESTMENT did not contest that a contract reasonably subject to conflicting

interpretations is ambiguous. The supporting Idaho law of that proposition is clear and mandatory.[1] EQUITABLE INVESTMENT does not contest that "[t]he substantial intent of the parties governs in interpreting contracts, and this is to be determined in view of the agreement as a whole, the matters with which it deals and the circumstances under which it was made."[2]

EQUITABLE INVESTMENT also appears not to disagree that the "contract" between the parties consisted of a "Design/Build Agreement," as well as emails and phone conversations.

Given the agreement on the law and the obvious conflicting reasonable interpretations among several of the terms and phrases in the contract, the trier of fact should inquire into the intent of the parties and the object of the transaction. "In construing an ambiguous contract, the object to be attained should be given prime consideration."[3]

This Court should be guided by prior decisions of *Werry v. Phillips Petroleum Co.*, 97 Idaho 130, 540 P.2d 792 (1975), *First Security Bank of Idaho v. Murphy*, 131 Idaho 787, 964 P. 2d 654 (1998). Justice and fairness in resolving this as well as other construction cases requires a trial.

3.2
A UNILATERAL RECISSION RIGHT IS INCONSISTENT WITH IDAHO LAW

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[1] *Spencer-Steed v. Spencer*, 115 Idaho 338, 766 P.2d 1219 (1988); *DeLancey v. DeLancey*, 110 Idaho 63, 714 P.2d 32 (1986).

[2] *Caldwell State Bank v. First Nat. Bank*, 49 Idaho 110, 286 P. 360 (1930), citing *Manson v. Curtis*, 223 N. Y. 313, 119 N. E. 559, Ann. Cas. 1918E, 247; *Schurger v. Moorman*, 20 Idaho, 97, 117 P. 122, 36 L. R. A. (N. S.) 313, Ann. Cas. 1912D, 1114. See also *Clarke v. Blackfoot Water Works*, 39 Idaho 304, 228 P. 326 (1924); *Wilson v. Fackrell*, 54 Idaho 515, 34 P.2d 409 (1934); *Bratton v. Morris*, 54 Idaho 743, 37 P.2d 1097 (1934).

[3] *Glover v. Spraker, 50 Idaho 16, 292 P. 613, 616 (1930).*

Ambiguities are to be construed against the drafter, and the $605,000.00 clause was authored by EQUITABLE INVESTMENT. (R 74, para. 8) The primary objective in construing a contract is to discover the intent of the parties, and in order to effectuate this objective, the contract must be viewed as a whole and considered in its entirety. *Doyle v. Ortega,* 125 Idaho 458, 461, 872 P.2d 721, 724 (1994).

The "Design/Build Agreement" clearly envisioned SPOKANE STRUCTURES going forward with the construction. This fact is evident from the change order language and the billing based on the percentage of the construction completed. As admitted by EQUITABLE INVESTMENT, after a series of communications, SPOKANE STRUCTURES submitted proposed draft plans with cost exceeding $605,000.00. These are not the final plans. It was EQUITABLE INVESTMENT's proposed modifications to the building aesthetics that made it imperative for SPOKANE STRUCTURES to revise the cost. (CR. 73-75). SPOKANE STRUCTURES is aware of the cost ceiling provision. In good-faith, SPOKANE STRUCXTURES submitted an objective estimate of the cost involved to build as per EQUITABLE INVESTMENT's requirements. If the cost is in excess, the appropriate step for EQUITABLE INVESTMENT is to ask for further modifications to complete the building within the stipulated budget, not repudiation without cause. As has been repeatedly stated by EQUITABLE INVESTMENT, there were to be draft plans until there was agreement on both cost as well as design as previously set forth. Linda Tomblin, for EQUITABLE INVESTMENT, proposed changes when the design was not acceptable, likewise, such changes raised the cost. (Lewis Affidavit; R 72-77) The change in cost does not render the contract impossible.

The intention of the parties is not clear as to the meaning of the $605,000.00 clause or the number of draft plans to be submitted before finalizing. EQUITABLE INVESTMENT, at times, contends that the "Design/Build Agreement" is an agreement to agree; at other times, EQUITABLE INVESTMENT contends that the contract's $605,000.00 is a cap. Essentially, EQUITABLE INVESTMENT claims, without saying, that the contract had a unilateral recission clause and that no event triggered the act of recission except the whim of EQUITABLE INVESTMENT.

Recission is equitable in nature and is intended to place the parties in the positions they occupied prior to the contract. Furthermore, recission is available only when one of the parties has committed a material breach which destroys the entire purpose for entering into the contract. *Blinzler v. Andrews,* 94 Idaho 215, 485 P.2d 957 (1971) The party desiring to rescind a contract must, prior to rescinding, tender back to the other party any consideration or benefit received under the contract by the rescinding party. *Haines v. Rowland,* 35 Idaho 481, 207 P. 428 (1922); see generally 17 Am.Jur.2d Contracts § 512 (1964); 17A C.J.S. Contracts § 439 (1963). EQUITABLE INVESTMENT's claim to a "get out of contract free card" is in violation of the obligation of personal responsibility set forth in Idaho law.

The District Court goes even further by allowing a unilateral recission without placing the parties to the position they held prior to the "contract."

> So, clearly, there is an agreement between the parties to work and engage in good faith toward reaching an agreement for the purposes of constructing and having a building constructed on the defendant's property. But the contract itself does not, in fact, obligate the defendant to actually enter into an agreement. (T. 7)

If the "contract" requires the parties to act in good faith, then why is it good faith to request design work and not pay for it? If the "contract" is an agreement "to work toward having a building constructed," but "the contract itself does not, in fact, obligate the defendant to actually enter into an agreement," then is this not a unilateral recission of the "Design/Build Agreement?" The District Court did err.

3.3
ALTERNATIVE PLEADINGS ARE ALLOWED UNDER IDAHO LAW

EQUITABLE INVESTMENT, in its Response Brief, and the District Court, in its Opinion, ignore the right of alternative pleadings. SPOKANE STRUCTURES has a legal right to make alternative pleadings to seek remedies. SPOKANE STRUCTURES claimed breach of contract and, in the alternative, equitable claims. The plaintiffs may allege and try their claims based on all the alternative counts. This right allows the trier of fact to decide the ultimate relief after presentation of all evidence and a full and fair trial. *Moon v. Brewer*, 89 Idaho 59, 402 P.2d 973 (1965). Full satisfaction attained by means of one of the alternate remedies would eliminate the other. *Id. Dickerson v. Brewster,* 88 Idaho 330(1965) allowed three alternate and inconsistent grounds for recovery under IRCP 8(e)(2). Under I.R.C.P. 8(e)(2), a party may plead alternatively, hypothetically, and may state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds or both.

3.4
COST CEILING IS NOT A CONDITION PRECEDENT

The "Design/Build Agreement" gave change order and billing instructions. These two provisions indicate that EQUITABLE INVESTMENT is obligated to proceed with

the construction. Just as EQUITABLE INVESTMENT proposed changes to aesthetics, it is entitled to propose changes to the cost and SPOKANE STRUCTURES was and is ready to construct the building within the contemplated cost of $605,000.00. The only condition precedent is the financing and none other as is evident from the plain language of the contract in dispute.

In *Kessler v. Tortoise Development, Inc.,* 130 Idaho 105, 937 P.2d 417 (1997) , 937 P.2d 417 (1997), the court ruled that the purchase agreement was ambiguous because there was no certainty about which provision controlled the agreement, the title provision or the default provision. As in *Kessler*, the contract in the present case is ambiguous as to whether or not there is cost ceiling or there is scope for variation in the construction cost on account of the presence of the change order provision. EQUITABLE INVESTMENT claims that the change order language only applies to the construction phase. That is not what the change order language states (CR. 34). The change order language expressly negates the ceiling on the construction cost and proves that the $605,000.00 was never intended to be a condition precedent.

3.5

SPOKANE STRUCTRUES IS ENTITILED TO EQUITABLE RELIEF

When the contract is ambiguous the party is entitled to equitable remedies if there is no remedy at law. Equitable "[relief] will be granted when in view of all the circumstances, to deny it would permit one of the parties to suffer a gross wrong at the hands of the other party, who brought about the condition." *Thisted v. Country Club Tower Corp.,* 146 Mont. 87, 405 P.2d 432, 436 (1965), quoting *Fey v. A.A. Oil Corp.,* 129 Mont. 300, 285 P.2d 578, 587 (1955). By ruling that the contract is unambiguous, when there are reasonable conflicting interpretations possible, the District Court made an

error. By ruling that a contract to work toward an agreement to construct a building is the only contract, but enough of a contract to stop any equitable relief for sums paid and benefits given results in a serious injustice to SPOKANE STRUCTURES.

3.6
A CONTRACT MUST BE CONSIDERED IN ITS ENTIRETY

EQUITABLE INVESTMENT and the District Court failed to consider all the provisions that supported the claims presented by SPOKANE STRUCTURES, but also did not take the evidence presented in the form of communications and testimony between the parties, which certainly was a part of the express contract. In doing so, the finding of fact and reasonable conclusions in favor of the moving party are in violation of the spirit and wording of the summary judgment rule.

3.7
AN AGREEMENT TO AGREE IS UNENFORCEABLE

EQUITABLE INVESTMENT, in the conclusion section of "Respondent's Brief" at the bottom of page 10, states that the contract was "an agreement to agree." Such a conclusion is a profound and accurate statement of the error and bespeaks the confusion inherent in the ruling of the District Court. It is firmly established under the law of Idaho that "agreements to agree" are unenforceable. The Idaho Supreme Court has made clear the legal status of agreements to agree:

> Generally, an agreement to agree is unenforceable, as its terms are so indefinite that it fails to show a mutual intent to create an enforceable obligation.... No enforceable contract comes into being when parties leave a material term for future negotiations, creating a mere agreement to agree." 17A AmJur.2d Contracts § 181 (2004).

Maroun v. Wyreless Systems, Inc., 141 Idaho 604, 614, 114 P.3d 974, 984 (2005)

Even without the inclusion of the term "agreement to agree," the courts are clear that incomplete, indefinite and uncertain contracts cannot be enforced.

> A contract will be enforced if it is "complete, definite and certain in all its material terms, or contains provisions which are capable in themselves of being reduced to certainty." *Giacobbi Square v. PEK Corp.*, 105 Idaho 346, 348, 670 P.2d 51, 53 (1983) (emphasis omitted). To meet this standard the contract must embody a distinct understanding of the parties, showing a meeting of the minds as to all necessary terms of the contract. E.g., *C.H. Leavell and Co. v. Grafe & Associates, Inc.*, 90 Idaho 502, 414 P.2d 873 (1966). The obligations of the parties must be identified so that the adequacy of performance can be ascertained. *Dale's Service Co., v. Jones*, 96 Idaho 662, 534 P.2d 1102 (1975). If terms necessary to a contract are left for future negotiation, the contract cannot be enforced. *Brothers v. Arave*, 67 Idaho 171, 174 P.2d 202 (1946).

Dursteler v. Dursteler, 108 Idaho 230, 233, 697 P.2d 1244, 1247 (1985)

EQUITABLE INVESTMENT concedes that the subject contract is an "agreement to agree." The District Court's holding is the same, although stated differently. The District Court states, "clearly, there is an agreement between the parties to work . . . toward reaching an agreement." (T. 7, ll 11-15) Consequently, SPOKANE STRUCTURES should be entitled to equitable remedies.

CONCLUSION

This appeal presents seven issues:

1. Did the District Court err in holding that the heart of this issue is a breach of contract?

2. Did the District Court err in holding that the contract is clear and unambiguous?

3. Did the District Court err in holding that an express contract which does not require any performance by one party is a valid contract?

4. Did the District Court err in holding that no equitable remedies lie in the matter?

5. Did the District Court draw all reasonable inferences in favor of the non-moving party?

6. Did the District Court liberally construe all facts of record in favor of the nonmoving party?

7. Did the District Court err in finding no contested issues of material facts?

EQUITABLE INVESTMENT has failed to adequately respond to the seven issues or to prove any reason the summary judgment should not be reversed. The District Court did err in holding that the heart of the case is a clear and unambiguous contract that was not breached. Idaho law does not allow agreements to agree that give one party the right to ignore performance. Alternative pleadings allow equitable rights to be pled and considered. Finally, the District Court's application of the summary judgment rule is erroneous because of its failure to draw reasonable inferences in favor of SPOKANE STRUCTURES, to liberally construe all facts in favor of SPOKANE STRUCTURES, and its failure to find contested issues of material facts.

In conclusion, based on the above reply to the arguments presented by EQUITABLE INVESTMENT, SPOKANE STRUCTURES prays that the District Court's grant of summary judgment be reversed.

RESPECTFULLY SUBMITTED this 22nd day of October, 2008.

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CERTIFICATE OF MAILING AND/OR DELIVERY

I hereby certify that on the 22 day of October, 2008, I served two true and correct copies of the foregoing document, in the manner indicated below, upon:

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		Coeur d'Alene, ID 83816-2530

Deborah Hylton

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